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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER TUVELL, *PETITIONER*
v.
MICROSOFT CORPORATION, *RESPONDENT*

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I.

Whether, for the purposes of Fed.R.Civ.P. 12(b)(6) motion-to-dismiss, the lower courts may grant the dismissal without hearing, refusing to consider proffered first amended complaint, while further affirmatively refusing to *state* (and indeed by self-announcement to not even *know*) any *reasons* for dismissal, thereby squarely contradicting this Court's long-standing holdings set forth in *Foman v. Davis* and its progeny.

II.

Whether, for the purposes of Fed.R.Civ.P. 12(b)(6) motion-to-dismiss, the lower courts must apply the federal *"notice-pleading"* standard of review, crediting *plaintiff's* aggregate factual averments (together with all reasonable and rational inferences therefrom) – or whether the courts may instead apply a novel heightened *"threshold"* standard to *weigh* facts, discredit plaintiff's pleadings, and credit *defendant's* story, thereby squarely contradicting this Court's long-standing holdings set forth in *Conley v. Gibson* and its progeny.

III.

Whether, for the purposes of Fed.R.Civ.P. 9(b) pleading of fraud with *"particularity"*, the lower courts should observe the long-standing *"circumstances"* standard, or otherwise state their standard of review – or whether the courts can hold plaintiff to a novel unnamed and unspecified standard, thereby squarely conflicting with the practices universally accepted in all federal courts at all levels which have publicly considered the matter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF THE CASE 1
Summary of Facts 2
Procedural Questions Preclude Review of Substantive Issues 4
Proceedings Below 4
REASONS FOR GRANTING THE PETITION 7
Standard of Review 7
I. 12(b)(6) Dismissal in the Absence of Stated (or Even *Known*) Reasons Is Abuse of Discretion, Conflicts with Supreme Court Decisions and with Statute, and Denies Constitutional Right to (Procedural) Due Process 8
II. 12(b)(6) Dismissal Applying a "Threshold Standard" Instead of the "Notice-Pleading" Standard Conflicts with the Federal Rules and with Supreme Court Decisions, and Denies Constitutional Right to Trial by Jury 12
III. Refusal to Accept "Circumstances" as Meeting the 9(b) "Particularity" Burden Conflicts with Established Opinions of All Federal Courts at All Levels 16
The Issues Presented Are Important to Our Society 18
Addendum. Six Conjectural, but Invalid, "Reasons" for Silent Dismissal 21
CONCLUSION 25
APPENDIX (Including *All* "Reasons" Stated Below On This Case) 26

TABLE OF AUTHORITIES

Cases

Conley v. Gibson, 355 U.S. 41 (1957) ..... i, 13, 15, 43
County of Los Angeles v. Kling, 474 U.S. 936 (1985) 20
Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628 (Third Circuit 1989) 16
Faretta v. California, 422 U.S. 806 (1975) 22
Foman v. Davis, 371 U.S. 178 (1962) ..... i, 9
Goldberg v. Kelly, 397 U.S. 254 (1970) 57
Griswold v. Connecticut, 381 U.S. 479 (1965) 24
Hicks v. Miranda, 422 U.S. 332 (1975) 25
Hughes v. Rowe, 449 U.S. 5 (1980) 22
In re Murchison, 346 U.S. 133 (1955) 57
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 13, 15, 20, 22
McNabb v. United States, 318 U.S. 332 (1943) 55
Olivera v. Nestle Puerto Rico, Incorporated, 922 F.2d 43 (First Circuit 1990) 24
Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991) 55, 56
Palko v. Connecticut, 302 U.S. 39 (1937) 57
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 56
Scheuer v. Rhodes, 416 U.S. 232 (1974) 13, 23
Schlup v. Delo, 513 U.S. 298 (1995) 9
Silber v. United States, 370 U.S. 717 (1962) 7
Solesbee v. Balkcom, 339 U.S. 9 (1950) 55
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 57
Twining v. State of New Jersey, 211 U.S. 78 (1908) 56

Statutes

28 U.S.C. §1254(1) 1
28 U.S.C. §1291 ..... 6, 12
28 U.S.C. §1331 ..... 5, 12
28 U.S.C. §1332 ..... 5, 12

28 U.S.C. §1367 ..... 5, 12
28 U.S.C. §1654 22
ADA (Americans with Disabilities Act, 42 U.S.C. c. 126 §§12101 *et seq.*) 10, 11
Judiciary Act of 1789 22

Constitutional Provisions

U.S. Const. Amend. 14 §1 ..... 8, 25
U.S. Const. Amend. 5 ..... 8, 25
U.S. Const. Amend. 7 15

Rules

Fed.R.Civ.P. 1 24
Fed.R.Civ.P. 11(b) 13, 18
Fed.R.Civ.P. 12(b)(6) ..... i, 5, 6, 8, 9, 11, 12, 13, 14, 15, 18, 43
Fed.R.Civ.P. 39(a) 15
Fed.R.Civ.P. 8(a)(2) 5, 12, 13
Fed.R.Civ.P. 8(e)(1) 5, 12
Fed.R.Civ.P. 8(e)(2) 23
Fed.R.Civ.P. 9(b) ..... i, 5, 6, 16, 17, 18
Loc.R. 27(c) 37
Sup.Ct.R. 10 8
Sup.Ct.R. 10(a, c) 7
Sup.Ct.R. 14(1)(a) 4
Sup.Ct.R. 33(1)(b) 26

Treatises

Moore's *Federal Practice*, Third Edition §9.03[1][b–c, g] 16
Stern, Gressman, Shapiro, Geller, *Supreme Court Practice*, Seventh Edition (1993) 8
Tigar, Tigar, *Federal Appeals, Jurisdiction and Practice*, Third Edition (1999) 25

Other Authorities

DSM-IV, Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association, Fourth Edition (1994) 11

Ginsburg, Ruth Bader, J., *The Obligation to Reason Why*, 37 University of Florida Law Review 205 (1985).....12, 21
Holmes, Oliver Wendell, Jr., J. *The Path of the Law*, 10 Harvard Law Review 457 (1897) 58
Krotoszynski, Ronald J., Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 Washington University Law Quarterly 993 (1999) 58
Mental Health, A Report of the Surgeon General, Department of Health and Human Services, U.S. Public Health Service (1999) 11
Posner, Richard A., Hon., *The Federal Courts: Challenge and Reform*, Harvard University Press (1996).....20, 21, 24

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v.

MICROSOFT CORPORATION, *RESPONDENT*

PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner Walter Tuvell (plaintiff and appellant below) respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The holdings of the district court and of the court of appeals are unreported. App. D, F, pp. 32, 36 *infra*.

JURISDICTION

The court of appeals entered its judgment on December 15, 2000. Petition for rehearing was denied on March 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This is a wrongful termination case involving repugnant corporate recruiting practices, sounding in discrimination, civil rights, fraud, contract and tort (it is not an "employ-

ment-at-will case"). Society and justice do not tolerate corporate behavior of the sort complained of – and neither does the law, by any reading of the statutes and cases.

This cause now reaches this Supreme Court, not on the substantive merits (never reached below), but because of clear abuse of discretion and procedural error by the lower courts, amounting to denial of due process. The district and circuit courts' handling of this case has been marked throughout its history by extraordinary and unjustifiable perfunctory indifference. Namely, the First Circuit courts (district, panel, *en banc*) have squarely disobeyed controlling precedents, yet maintained *absolute silence* about their *reasons* for doing so. Such judicial misconduct is utterly contrary to legal tradition as well as this Court's express teachings, strongly tending to erode public confidence in the American judicial system.

Summary of Facts

In early 1997 Microsoft initiated a vigorous and aggressive effort to recruit Mr. Tuvell to a senior technical position. But at some point Microsoft became *secretly* concerned about the *personality (psychological makeup)* of his wife, one Linda King: Microsoft thought Ms. King was "too sentimental/emotional/etc. about Boston, and therefore incapable of relocating to Seattle". But Microsoft *concealed* its concern from Mr. Tuvell (and Ms. King) – having given previous *explicit* (false) promises of family-friendliness, of non-interference in private marital matters (*specifically relocation*), and to affirmatively and proactively *explain* "all aspects" (i.e., *no secret aspects*) of the hiring process.

So instead, taking actions consistent with its (equally *secret*) prior policy and practice, Microsoft put into motion a scheme of deception: Microsoft offered Mr. Tuvell the job and relocation on April 11, 1997, which Mr. Tuvell accepted in good faith – orally, by mutual agreement (Microsoft apologizing (falsely) that its lawyers had temporarily

"flagged" the written offer for insubstantial wordsmithing). But Microsoft also *coerced* Mr. Tuvell (by holding his job "hostage") to bring Ms. King to a *sham* post-acceptance dinner party, for the purpose of conducting a surreptitious "psychological test" of Ms. King's "capability, preparedness, and happiness to relocate".

Ms. King "failed" that test in Microsoft's eyes, and Microsoft *secretly* decided to fire Mr. Tuvell therefor. But Microsoft did not so inform Mr. Tuvell at the time – to the contrary, Microsoft strongly encouraged, acknowledged and reaffirmed Mr. Tuvell's job acceptance.

Not until *four days* later, on April 15, 1997, after Mr. Tuvell had already submitted his resignation letter to his then-employer, did Microsoft inform Mr. Tuvell of his termination, saying the reason was Ms. King's perceived psychological non-relocateability – but dangling reinstatement on express condition that Ms. King "set aside her concerns about relocation".

Mr. Tuvell, mistakenly (because of Microsoft's secrecy and fraud) believing Microsoft's actions to be innocent though misguided, and its conclusions certainly flawed, did then definitively reaffirm his and his wife's interest in accepting the job and relocation package. (Ms. King did so as well.)

But Microsoft on April 18, 1997 unaccountably refused reinstatement, giving a known-false and defamatory reason: Microsoft claimed that Ms. King's preparedness for relocation was *never* a reason for termination, but rather Mr. Tuvell's "bad business judgment" was *always* the *only* reason.

The several elements of plaintiff's complaint came together on April 14, 1997 at an illicit "post-acceptance go/no-go" meeting of the three named Microsoft principals in this case (David Thompson, Margaret Johnson, Meg MacGougan). An alleged paraphrase of that meeting, keyed to the several elements of plaintiff's complaint, was presented to the courts below and is included herein at App. A, p. 28 *infra*.

Procedural Questions Preclude Review of Substantive Issues

Even without more, the irreducible core fact that Microsoft fired Mr. Tuvell because it believed his wife was "psychologically incapable of relocating" already justifies eight of the fifteen counts of plaintiff's complaint. App. A, p. 29 *infra*, items i-viii. Yet there is much more to this case – centered around the equally core charge of fraud/deception – according to which plaintiff's other seven counts are equally justified. App. A, p. 29 *infra*, items ix-xv.

Plaintiff pled his substantive counts to the district court, and briefed them all on appeal to the circuit court. See the record below for a full treatment and detailed legal argumentation, especially the 85-page main Brief of Appellant/Plaintiff filed on appeal to the circuit court. See also App. J, p. 43 *infra*.

But the lower courts peremptorily and wrongly refused to reach the substantive legal merits of the case (or even *listen* to plaintiff's story – see *infra*). The *merits* of this case are in fact ripe for review by the usual standards of fact, law and parties. But the *procedural* problems posed by Questions I-III *prevent* plaintiff or this Court from reviewing (or even discovering) the lower courts' *reasoning* regarding the merits of the case. Being thus judicially underdeveloped, the merits cannot now be conveniently reviewed by this Court, and the questions here presented are necessarily limited to the procedural aspects of the case. (Plaintiff would however welcome review of the merits, which are of course "fairly included" in the questions presented. Sup.Ct.R. 14(1)(a).)

Proceedings Below

Plaintiff immediately retained counsel in April 1997. Following proceedings at the MCAD (Massachusetts Commission against Discrimination) and EEOC, a suit was filed at court in September 1997. That suit was dismissed *without prejudice* in January 1998, for reasons stated, due to manifest

"ineffectiveness" by plaintiff's lawyer (counsel utterly failed to plead plaintiff's complaint competently).

Thereupon plaintiff disowned/disavowed his counsel's work, and starting over as a *pro se* litigant completely rewrote his complaint, comprehensively addressing all reasons stated for the previous dismissal, and adding several new counts. Suit in the instant case was filed at district court (D.Mass.) in May 1999, invoking jurisdiction under 28 U.S.C. §§1331, 1332, 1367. See complaint at Record Appendix below, Tabs J-K.[1] See also App. A, J, pp. 28, 43 *infra*.

Microsoft moved for dismissal on three grounds: "short and plain" rules (Fed.R.Civ.P. 8(a)(2), 8(e)(1)), "failure to state a claim" (Fed.R.Civ.P. 12(b)(6)), and "pleading of fraud" (Fed.R.Civ.P. 9(b)).

Plaintiff filed first amended complaint including all fifteen counts, to comply with "short and plain" rules. Record Appendix below, Tab P (20-page 15-count version). The district judge acknowledged in chambers that proffered amended complaint properly met the "short and plain" rules as to all fifteen counts. Yet the district court, *without hearing*, flatly refused to accept said amended complaint as to fourteen counts, with *no hint* why, and allowed only the *single* count of fraud to proceed. App. B, C, pp. 30, 31 *infra*. When plaintiff explicitly asked the *reasons* for silent dismissal of fourteen counts the district judge cursorily answered, *"I don't know"* (*verbatim*, deliberately, smiling broadly). That was "arbitrary and capricious" behavior, and was denial of due process, amounting to reversible abuse of discretion. Question I.

At the only hearing ever held in this case, restricted to the *single* count of fraud (including misrepresentation), the district court committed two further reversible errors in the *standards of review* it applied (App. D, p. 32 *infra*):

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[1] One count was added at the time of service, in June 1999. That addition did not constitute an "amended complaint" in the sense of Question I.

- *First:* In reviewing the 12(b)(6) motion, the court incorrectly introduced a novel heightened *"threshold standard"* (so-called by the court itself), instead of the correct classical *"notice-pleading standard"* mandated by the Federal Rules. Question II.

- *Second:* In reviewing the 9(b) motion, the court wrongly refused to apply the well-known *"circumstances" standard*, and instead applied its own novel (unnamed and unspecified) standard. Question III.

On any impartial reading of the record, plaintiff's pleadings plainly and easily satisfy the "notice-pleading" and "circumstances" standards. But as with its refusal to state its reasons for dismissal of fourteen counts, the court refused to state any reasons or cite any authorities for its abrogation of these universally accepted standards of review.

The district court thereupon summarily dismissed the case in March 2000 – without ordering defendant's answer to complaint, without permitting any discovery, without stating any reasons for dismissal of fourteen counts, and without publishing an opinion of any kind. App. E, p. 35 *infra*.

Plaintiff raised all these issues (both substantive and procedural) on appeal, invoking jurisdiction under 28 U.S.C. §1291. But the circuit panel denied both pre-argument conference and oral argument, and summarily upheld the district court on the briefs in December 2000, superficially finding "no error" with the district court's refusal to state reasons. App. F, G, pp. 36, 38 *infra*. The circuit panel itself also refused to state any reasons rationalizing the dismissal of fourteen counts, or for illicit adoption of the "threshold standard", or for rejection of the "circumstances" standard.

Plaintiff petitioned the circuit court (both panel and/or *en banc*) for rehearing, explicitly raising the same Questions I-III herein submitted to this Court. But both the panel and *en banc* courts summarily denied rehearing. App. H, p. 39 *infra*. All the First Circuit courts have thereby affirmatively re-

fused to state any rational reasons of any kind on any topic under review (Question I), or any principled defenses for the use of incorrect standards of review (Questions II–III).

REASONS FOR GRANTING THE PETITION

Standard of Review

Certiorari is granted upon the sound discretion of this Court. The questions presented by this petition fully comport with the characteristics that historically animate the Court's grant of *certiorari*:[2]

- A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals ... has *so far departed from the accepted and usual course of judicial proceedings*, or *sanctioned* such a departure by a lower court, as to call for an exercise of this Court's *supervisory power*; ... (c) ... a United States court of appeals ... has decided an important federal question that *conflicts with relevant decisions* of this Court.

  – Sup.Ct.R. 10(a, c)

The Court consistently exercises its judicial oversight supervisory power in cases exhibiting plain judicial error involving important concerns, especially "[i]n exceptional circumstances ... if the *errors are obvious*, or if they otherwise seriously affect the *fairness, integrity or public reputation of judicial proceedings*" (*Silber v. United States* 718):

- A *direct conflict* between the decision of the court of appeals of which review is being sought and a decision of

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[2] In quotations throughout this petition, emphasis has been added, and citations and internal quotation apparatus have been omitted.

> the Supreme Court is one of the ***strongest possible grounds*** for securing the issuance of a writ of certiorari. ... Where the decision of the court of appeals *clearly fails* to apply prior Supreme Court decisions because of error or oversight, the Court usually grants *certiorari*. ... And where the court of appeals *deliberately refuses to follow* the applicable Supreme Court decisions ... *certiorari* is likely to be granted.
>
> — Stern, Gressman, 174–175

While the lower courts did clearly strikingly err in this case, the questions presented in this petition also far transcend the factual and legal merits of this individual case, and are of great importance to our society at a national scope:

- A petition for writ of *certiorari* is rarely granted when the asserted error consists [merely] of erroneous factual findings or the misapplication of a properly stated rule of law.

  — Sup.Ct.R. 10

I.
12(b)(6) Dismissal in the Absence of Stated (or Even *Known*) Reasons Is Abuse of Discretion, Conflicts with Supreme Court Decisions and with Statute, and Denies Constitutional Right to (Procedural) Due Process

The district court refused to permit proffered first amended complaint and dismissed fourteen of plaintiff's counts, without hearing and without stating any *reasons* whatsoever. Not one single word (*"sub silentio"*). In response to plaintiff's direct plea for reasons, the district judge affirmatively refused to give reasons, announcing that the court *couldn't* give reasons because it *literally didn't know* its reasons for dismissal. I.e., the judge *had* no rational justifying reasons for dismissal, and didn't even bother *hearing* or *thinking (meaningfully) about* the case. That was clear denial of *due process*. U.S. Const. Amend. 5, 14 §1. See App. K, p. 55 *infra*.

It was also unmotivated "arbitrary and capricious" behavior, and hence was abuse of discretion. For, in silently dismissing the fourteen counts, the district judge (with the inexplicable sanction of the circuit court) flatly disobeyed this Court's well-established teaching set forth in *Foman v. Davis*:

- If the *underlying facts or circumstances* relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to *test his claim on the merits.* In the *absence of any apparent or declared reason* ... the leave [to amend] sought should, as the rules require, be freely given. Of course, the grant or denial of an opportunity to amend is within the [sound] discretion of the District Court, but *outright refusal* to grant the leave *without any justifying reason appearing* for the denial is not an exercise of discretion; it is merely *abuse of that discretion* and inconsistent with the spirit of the Federal Rules.

  — *Foman v. Davis* 182

The true *gravamen* of *Foman v. Davis* is of course the failure to state reasons *per se*, not the rejection of amendment:

- The ... concern about caprice is met — as it is met for *all* decisions committed by law to the discretion of lower courts — by applying *traditional "abuse-of-discretion" standards.* ... Here as elsewhere in the law, to say that a district judge may not *abuse his discretion* is *merely* to say that the action in question ... may not be done without *considering relevant factors* and *giving a justifying reason* ... [Citing *Foman v. Davis.*]

  — *Schlup v. Delo* 348, Scalia, J.

By any objectively *fair* (i.e., rational and unbiased) reading, *all* of plaintiff's pleadings have a substantial foundation in both fact and law. Thus, no legitimate reasons in fact *existed* for 12(b)(6) dismissal of *any* count. Addendum, p. 21 *infra.*

Let one representative example suffice to illustrate this point. Plaintiff's claim for federal disability discrimination is summarized in the following 3-part bullet-list. This claim *may* be

invalid. But if so, it is beyond cavil that the *reason* for its invalidity is not apparent as a matter of law, hence clearly demands pronounced (non-silent) judicial development:

- *Statement of Claim:* Microsoft took adverse employment action against Mr. Tuvell because he is related and associated to individual(s) (Ms. King, and secondarily Ms. King's elderly and ailing parents), all of whom Microsoft (wrongly) regarded as being mentally (Ms. King and Mr. Tuvell) or physically (Ms. King's parents) incapable of successfully relocating/migrating to Seattle (mixed motive, with other motives claimed in other counts).

- *Legal Grounds for Claim:* Americans with Disabilities Act (ADA). (i) Surreptitious, unannounced, unvalidated, non-job-related "psychological testing", administered by untrained, unqualified and incompetent personnel, under socially manipulative conditions at a sham party, is prohibited. ADA §§12112(b)(6), (d)(1). (ii) Discrimination on the bases of physical and mental (including psychological) disabilities is prohibited. ADA §12102(2)(A). (iii) "Proxy" discrimination, i.e., discrimination on the basis of "relational" or "associational" disability – especially *marriage*-proxy, i.e., discrimination on the basis of the marriage relationship – is prohibited. ADA §12112(b)(4). (iv) Discrimination on the basis of "regarded-as" disability – i.e., myths, fears and stereotypes (the issue is solely *employer intent*: the employee *need not be debilitated* at all) – is prohibited. ADA §12102(2)(C). (v) The "(in)ability to relocate/migrate" is a "substantial limitation of a major life activity" in the sense of disability discrimination. ADA §12102(2)(A).

- *Factual Grounds for Claim:* (i) Microsoft *admits* it has a corporate policy and practice of taking adverse job actions against candidates and/or employees in similar situations, and that it exercised said policy in this instance precisely because it regarded Ms. King (and therefore Mr. Tuvell, "psychologically burdened" as he was

by his wife) as being psychologically incapable of successfully relocating/migrating. App. I, p. 41 *infra*. This despite constant and definitive reassurances from Mr. Tuvell (and Ms. King) that nothing beyond the ordinary stresses of relocation/migration were involved, and that Ms. King's personal coping mechanisms were simply a natural life-long (inherited) part of her personality. (ii) Ms. King is in fact a diagnosed life-long sufferer of certain stress/anxiety disorders (in the sense of the DSM-IV), as a result of which she was under the influence of prescription medication at the sham dinner party (as at other times of her life). But that fact is irrelevant and immaterial to this case (it was *of course* none of Microsoft's business, for *any* purpose (not just the *highly subjective, very remote leap* to her "psychological ability to relocate")). (iii) "For too long the *fear of mental illness has been profoundly destructive to people's lives.* In fact mental illnesses are just as real as other illnesses, and they are like other illnesses in most ways. Yet *fear and stigma persist, resulting in lost opportunities* for individuals to seek treatment and improve or recover. ... [T]he *most formidable obstacle* to future progress in the arena of mental illness and health ... is *stigma* [i.e., "regarded-as" discrimination, ADA §12102(2)(C)]. Stigmatization of mental illness is an *excuse for inaction and discrimination* that is *inexcusably outmoded* in 1999." *Mental Health.*

This 3-part bullet-list is a *highly abbreviated* version of plaintiff's argument presented to the lower courts. No rational unbiased reader can contend this pleading model is susceptible to 12(b)(6) dismissal, absent "justifying reasons". *All* fifteen of plaintiff's claims are developed below in similar precise 3-part bullet lists, in the 85-page main Brief of Appellant/Plaintiff (supplementing plaintiff's 20-page "short and plain" amended complaint). These *all* easily meet plaintiff's burden under 12(b)(6). Therefore the lower courts' dismissal of each and all of the fourteen counts was clearly erroneous.

This Question I has a serious *statutory* dimension. Namely, the *"obligation to reason why"* is required, not only generally by the *public accountability* required of all government agents, but also specifically by the *statutory mandatory jurisdiction* of the inferior courts (28 U.S.C. §§1331, 1332, 1367, 1291):

- [District courts and] [c]ourts of appeals may not choose their cases. We do not deal in writs of *certiorari*. A *peremptory judgment without any stated reason* bears an uncomfortably close resemblance to *simple rejection of a case as unworthy of review.*

— Ginsburg 222

II.

12(b)(6) Dismissal Applying a "Threshold Standard" Instead of the "Notice-Pleading" Standard Conflicts with the Federal Rules and with Supreme Court Decisions, and Denies Constitutional Right to Trial by Jury

In our federal judicial system, no line of decisions of this Court is more canonical than its classic interpretations of the "notice-pleading standard" (Fed.R.Civ.P. 8(a)(2), 8(e)(1)), as set forth in the context of 12(b)(6) motions-to-dismiss:

- In appraising the sufficiency of the complaint we follow, of course, the *accepted rule* that a complaint should *not be dismissed for failure to state a claim* [i.e., 12(b)(6)] unless it appears *beyond doubt* [the strongest possible standard of proof] that the plaintiff can prove *no set of facts* [i.e., no set of facts *can exist*] in support of his claim which would entitle him to relief. ... [T]he Federal Rules of Civil Procedure *do not require* a claimant to set out in detail the facts upon which he bases his claim. To the contrary, *all* the Rules require is a *short and plain statement [no proof is required]* of the claim that will give the defendant *fair notice ["notice-pleading"]* of what the plaintiff's claim is and the grounds upon which it rests. ... The Federal Rules *reject the approach that pleading is a game of skill* in which one

misstep by counsel may be decisive to the outcome and accept the principle that the *purpose of pleading* is to *facilitate a proper decision on the merits.*

— *Conley v. Gibson* 45–48

In implementing the notice-pleading standard, the well-established rule in 12(b)(6) proceedings is that the courts *must credit plaintiff's* aggregate factual averments, together with all *reasonable/rational inferences/conclusions favorable to the (non-moving) pleader* therefrom:

- [I]t is *well established* that, in passing on a *motion to dismiss,* whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed *favorably to the pleader.*

  — *Scheuer v. Rhodes* 236

- We review here a decision granting a *motion to dismiss,* and therefore *must accept as true all* the factual allegations[3] in the complaint. ... According to respondents, the *degree of factual specificity* required of a complaint by the Federal Rules of Civil Procedure *varies according to the complexity of the underlying substantive law[s].* ... We think that it is impossible to square the *"heightened pleading standard"* applied ... in this case with the *liberal system of "notice pleading"* set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include *only* "a short and plain statement of the claim showing that the pleader is entitled to relief". In *Conley v. Gibson* ... we said in effect that *the Rule meant what it said* ... *Expressio unius est exclusio alerius* ["the expression of one thing is the exclusion of another"].

  — *Leatherman v. Tarrant County* 164, 167–168

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[3] This includes even "conclusory" allegations, i.e., bare allegations not supported by other facts but merely certified to be supported by plaintiff's "knowledge, information and belief". Fed.R.Civ.P. 11(b). In the instant case, plaintiff's allegations are all very well supported (*non*-"conclusory").

But in the case at bar, the lower courts flatly disobeyed this Court's teachings concerning the notice-pleading standard, and contrariwise actually invented and applied a neologistic "threshold standard". As explicitly explained and applied by the lower courts, this "threshold standard" unilaterally empowers judges, at their unrestricted whim, to: (i) view factual allegations in the light *least* favorable to plaintiff, (ii) *doubt and discredit* plaintiff's story, (iii) *weigh* facts, (iv) *credit defendant's* story instead, and (v) grant 12(b)(6) dismissal pursuant thereunto. That was clear error.

Here are the district judge's *verbatim* words, squarely contradicting the Federal Rules and this Court's precedent:

- That the Tuvells were – that Mr. Tuvell, in particular, was put out by Microsoft's behavior, that you were misled, *may all be true*. But the question is whether or not the allegations in the complaint meet the *threshold standard*. And *I agree with Microsoft* that this does not. *You may believe* that the facts underlying all the things that Microsoft did are as you've described, but *that's not enough to go on in this court.* ... [Y]our statements of belief can't be enough.[4] ... *I suppose there are two interpretations* one could have. *One could be* that the dinner was intended to do one more look-see at the candidate, and something happened at that dinner party which made Microsoft reconsider its offer. *I suppose it's conceivable* that it was a ruse to psychological test, but even if one admits that that's conceivable, that's not enough under the facts of this case. *That's simply not enough. If there's an A alternative and a B alternative, and either is conceivable, then you haven't made your – then you haven't met your standard* [squarely conflicting with the "beyond doubt" test of

[4] In *addition* to incorrectly applying the wrong standard of review, the judge's characterization of the record is *provably "counterfactual"*, as examination of the record easily proves. See App. I, p. 41 *infra*, for example.

Conley v. Gibson, and the "must accept as true" commandment of *Leatherman v. Tarrant County*].

— District judge, App. D, p. 32 *infra*

The First Circuit's "threshold" standard squarely conflicts with the "notice-pleading" standard. It imposes a *heightened standard of review* on 12(b)(6) proceedings *never before conceived of* in modern federal law. It is of course *ipso facto* error. *Leatherman v. Tarrant County*, p. 13 *supra*. The profound depth and magnitude of that error taints *every aspect*[5] of the lower courts' handling of this case, making dismissal wholly suspicious and unreliable. Dismissal was thereby reversibly erroneous as to each and all fifteen counts.

This Question II has a serious *constitutional* dimension. Namely, courts are affirmatively *barred* from adopting a "threshold standard" because by doing so they arrogate unto *government officials (judges)* the fact-finding role properly reserved in our legal tradition to a *jury of private persons*. Judges (*qua* judges) can make *conclusions of law*, but *cannot* make *findings of fact* (absent consent of the parties):

- In Suits at common law, where the value in controversy shall exceed twenty dollars, the *right of trial by jury* shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

  — U.S. Const. Amend. 7

- The trial [i.e., *finding-of-fact*] of all issues so demanded *shall* be by jury.

  — Fed.R.Civ.P. 39(a)

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[5] Strictly speaking, the lower courts *expressly* relied on their threshold standard only in the context of 12(b)(6) dismissal of the *fraud* count. The courts dismissed the *other* fourteen counts without stating what standard of review they relied upon. But it would be logically *inconsistent* for the courts to rely upon the threshold standard for *only one* of their fifteen 12(b)(6) dismissals. See also Addendum, conjecture #6, p. 24 *infra*.

- A judge sitting with a jury is *not competent* to decide *issues of fact* [– only to make *conclusions of law*].

– *Prentis v. Atlantic Coast Line* 227, Holmes, J.

III.
Refusal to Accept "Circumstances" as Meeting the 9(b) "Particularity" Burden Conflicts with Established Opinions of All Federal Courts at All Levels

Fed.R.Civ.P. 9(b) imposes a heightened pleading standard on allegations of fraud, namely a *"particularity"* requirement. As generally interpreted by all district and circuit courts which have considered this matter, the 9(b) "particularity" burden is satisfied by the *(mere) recitation* of the *"circumstances"* of fraud, as to: (i) identity of (mis)representor; (ii) method, (iii) time, (iv) place and (v) type/content of (mis)representation; and (vi) consequences (reasonable reliance and resulting injury). See Moore's §9.03[1][b–c, g].

The cases in all circuits further agree that the 9(b) "particularity" standard is to be harmonized (relaxed) in favor of the overarching "notice pleading" standard where justice so requires (independently of whether or not the "particularity" requirement is satisfied by recitation of "circumstances"):

- [F]ocusing exclusively on the particularity requirement is *too narrow* an approach and fails to take account of the general simplicity and flexibility contemplated by the ["notice pleading"] rules. ... Courts must be sensitive to the fact that application of Rule 9(b) *prior to discovery* may permit *sophisticated defrauders* to successfully conceal the details of their fraud. ... Particularly in cases of *corporate fraud*, plaintiffs *cannot be expected* to have personal knowledge of the details of *corporate internal affairs*.

– *Craftmatic Securities Litigation v. Kraftsow* 645

In the case at bar, plaintiff's pleadings plainly "recited" (with more) the "circumstances" of his fraud allegations. But the lower courts inexplicably refused to recognize the "circum-

stances" standard as defined *supra*, and therefore wrongly held that plaintiff's pleadings did not satisfy the 9(b) "particularity" burden. Nor did the lower courts specify the standard of review ("circumstances" or other) they actually *did* use to review the 9(b) motion. That was plain error.

Let one representative example suffice to illustrate this point (fuller argument is given in the record below, of course):

- *Assignment of error (judge's assertion that "particularity" standard was not met):* The district judge baldly asserted at the December 15, 1999 hearing that, "The statements made on [the morning of] 4/11 also are not actionable [apparently on 9(b) grounds]." See App. D, at p. 33 *infra*.

- *Proof of error (recitation of "circumstances"):* Plaintiff's pleadings explicitly recite that on the morning of April 11, 1997, at a face-to-face meeting between plaintiff (including his family, by coercion) and a named Microsoft employee, in her office on Microsoft's corporate campus in Redmond, Washington, said employee falsely represented (with full *scienter* including intended reliance, with Microsoft's authorization, and in the course of her employment) that an unnamed Microsoft lawyer had "flagged" plaintiff's contract for mere wordsmithing (not substantive) reasons. Said employee further falsely represented that for Microsoft's convenience, oral acceptance would therefore suffice to bind the employment agreement. Plaintiff thereby did give his oral acceptance, which was acknowledged by Microsoft. In reliance that he was thereby employed by Microsoft, and hence covered by Microsoft's standard employment policies and practices (as represented both in Microsoft's public representation and privately to its employees), plaintiff attended the sham dinner party that evening (together with his family's coerced attendance), never suspecting that Microsoft's misrepresentation about "flagging" the contract was in fact a ruse to subject his wife to a surreptitious, premeditated "psychological test" of her "capa-

> bility, preparedness, and happiness to relocate" at the sham party. Said surreptitious investigation was the proximate cause of plaintiff's abrupt termination, depriving him of the much-desired job and equally-desired relocation, and resulting in serious emotional damage to plaintiff and his wife, and to their marriage. Plaintiff further relied on Microsoft's misrepresentation to submit his resignation letter to his then-employer, resulting in irreparable damage to his then-employment situation.

No rational unbiased reader can contend this recitation fails the "circumstances" test. *All* of plaintiff's pleading of fraud are equally well developed, easily satisfying all six criteria of the "circumstances" standard (p. 16 *supra*). Therefore the courts' dismissal of the fraud count on 9(b) grounds (and/or 12(b)(6) grounds, Question II) was plain error.

More "particularity" than has been stated in plaintiff's pleadings cannot, of course, be expected at motion-to-dismiss stage. For, plaintiff is necessarily hampered by the lack of defendant's answer to complaint and of discovery (neither permitted by the district judge). Hence plaintiff's aggregate package of proof is necessarily subject to the "inquiry reasonable under the circumstances" standard. Fed.R.Civ.P. 11(b). Since Mr. Tuvell never actually worked for Microsoft and has no access to its internal resources, defendant has exclusive control over all further information.

The Issues Presented Are Important to Our Society

The disposition of this case (Questions I-III) is unarguably *opposed to all documented authority of law and due process* in America — constitution, statutes, cases, rules, treatises, "other". The courts discarded *stare decisis* ("the principle of precedent") in favor of "*secret (undocumented) law*".

The question arises: Was this outright refusal to "play by the rules" an anomalous act by a few rogue judges, or does it occur with some regularity (i.e., is it a generic problem in our

society)? The unequivocal answer: Secret law is endemic. The indisputable proof: It has been famously exposed by the ultimate authoritative "industry insider", the Hon. Richard A. Posner, chief judge of the 7th Circuit Court of Appeals:

- An *insidious practice* of a number of federal courts of appeals today is, in the *nonargued* cases, to dispense not only with the argument but also with the conference. ... The tendency to sign on the dotted line with *little real consideration* of the case must be great. ... Perhaps because an unargued case is thought *less likely to be decided well* than an argued case, *unpublished opinions* have become the usual method of disposing of appeals that are not orally argued ... The question thus arises whether there should be a class of federal appellate opinions that *cannot be used as precedents*. ... [N]onpublication encourages *judicial sloppiness*. Or worse, the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be *too blatant an evasion of judicial duty*. ... The result is a *bias*, in *favor* of the institutional litigant [and *adverse* to individual litigants], in the *creation of precedent* ... regardless of the actual merit of its position. ... It is a choice, in other words, between giving the parties reasons for the decision of their appeal and *not giving them reasons* even though the appeal is not frivolous. ... Judges are supposed to base their judgments on grounds capable of being *rationally explained and defended* even though the choice of grounds may be intuitive and their validity not fully demonstrable by rational processes. The *nonreasoned opinion* amounts to saying, "I disagree with you but I won't say why", thus *flouting the obligation* of the appellate judge to *give public reasons for judgments*. ... The *least visible* but *probably most important* way in which the pressure of a growing caseload has resulted in streamlining or corner cutting is found in the district courts and involves the *sub rosa* ["secret"] redefinition of the standards

for granting summary judgment and for *dismissing a complaint for failure to state a claim*. ... Motions to dismiss for failure to state a claim are *supposed to be* granted only if there is *no possible state of facts* consistent with the allegations of the complaint that would entitle the plaintiff to win. Increasingly, district judges, sometimes *abetted by court of appeals judges*, dismiss a complaint because it fails to allege facts critical to the plaintiff's claim, even though the Federal Rules of Civil Procedure do not (with a few exceptions) require that a complaint plead facts — *conclusions will do*, provided there is enough specificity to enable the defendant to frame a response. The Supreme Court has *rebuked this effort*, but *it is continuing in some federal courts*. [Citing *Leatherman v. Tarrant County*.] ... [T]he freer granting of motions of summary judgment and for dismissal for failure to state a claim, *harms plaintiffs*, especially those who are *poorly represented* (hence not "elite" plaintiffs such as government agencies or *large corporations*). ... The redefinitions of summary judgment and dismissal on the pleadings I have been discussing are *questionable* in formal legal terms.

— Posner, Chap. 6 *passim*

- Th[e] *decision not to publish* the opinion or permit it to be cited — like the decision to promulgate a [local] rule [compare p. 37 n. 10 *infra*] spawning a body of *secret law* — was *plainly wrong*. [Citing Posner (1985 edition).]

— *County of Los Angeles v. Kling* 938, Stevens, J.

As demonstrated by Posner *supra*, the instant case is *not* rare or unique. Some lower courts have been creating and applying "secret law" long before this case, and they will continue to do so long afterwards (unless directed to stop by this Court). What *is* compellingly noteworthy about the case at bar is that this must be the first time the "secret law" question has reached this Supreme Court in the posture of a justiciable "case or controversy". For otherwise, this Court would surely have put a stop to the practice before now:

- The circuits have experimented and gained experience with their *diverse publication plans* for over a decade. *The time has come*, I believe, for *central review* of accumulated experience in the interest of establishing a *sensible, even-handed system for all of the circuits.* [See p. 37 n. 10 *infra*.]

  — Ginsburg 223

"Secret law" is *no law*, properly so-called, at all. Holmes, App. K at p. 58 *infra*. The lower courts' breathtaking disregard for multiple long-standing core principles of law represents (with all due respect) a "farce and mockery of justice" — not only in this case, but in many cases of the past (Posner, *supra*), and with high likelihood of recurrence in many more cases in the future. This Court's immediate *certiorari* review of this very important issue is therefore vital, to administer a supervisory correction to the lower courts, for the purpose of restoring stability, uniformity, credibility, predictability, integrity and public confidence to American law.

Addendum.
Six Conjectural, but Invalid, "Reasons" for Silent Dismissal [6]

The district court "didn't know" any reasons for dismissal of fourteen counts (by self-proclamation), and the circuit panel inexplicably found "no error" with that non-existence of reasons. Nevertheless, perhaps the circuit court *itself* did "know" reasons for dismissal — which it however chose to leave *unstated* (despite plaintiff's plea for statement of reasons), perhaps because of the reasons' "well-known" consistency with *stare decisis*. On that theory, the following six "conjectures" may be propounded. These conjectures are suggested by the actions the courts took, though never ar-

[6] This section is styled an "addendum" because it is "relevant but optional", in the sense that it provides an auxiliary mode of argumentation (namely, conjectures) further supporting this petition's primary arguments regarding Question I *supra*.

ticulated by them. But these conjectured reasons too are invalid, as noted by the refutations that follow.

Conjecture #1: Perhaps the courts thought that a *pro se* plaintiff wasn't "entitled" to litigate his own case at court, or wasn't "smart enough" to do so.

Refutation #1: Plaintiff is entitled to self-representation by 28 U.S.C. §1654 – originally enacted by the First Congress in the Judiciary Act of 1789, and signed by George Washington. *Faretta v. California* 812. He is a trained mathematician (B.S., MIT; Ph.D., University of Chicago, 1981), who has been employed for many years as a software professional in the field of computer security, so he is very well acquainted with deeply technical argumentation. He is (now) studied in the law, and is well equipped to act in his own behalf. Further, this Court has promulgated a specific "liberal interpretation" rule to the benefit of *pro se* litigants:

- Petitioner's complaint ... was *not prepared by counsel.* It is *settled law* that the allegations of such a [*pro se*] complaint, *however inartfully pleaded* are held to less stringent standards than formal pleadings drafted by lawyers ... Such a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief [per *Conley v. Gibson*, p. 12 *supra*]. And, *of course*, the allegations of the complaint are generally *taken as true* for purposes of a motion to dismiss.

  – *Hughes v. Rowe* 9–10

Conjecture #2: Perhaps the courts thought that fifteen counts were "too many", making the case "too complicated".

Refutation #2: These conditions are inherent in the nature of the case and are beyond the control of the plaintiff. There is no legal concept of a case "too complex" (or "too illegal") to be litigated. For, as this Court held with shining clarity in *Leatherman v. Tarrant County* (p. 13 *supra*), the Federal Rules *"mean what they say", even in "complex" cases*:

- A party may also state *as many separate claims* or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

— Fed.R.Civ.P. 8(e)(2)

Conjecture #3: Perhaps the courts thought that a small individual plaintiff with limited resources was "unlikely" to prevail against a large powerful corporation, or if successful that the jury might not reward plaintiff "enough" damages.

Refutation #3: This Court has held that judges may not pretend to predict the future course of litigation:

- The primary question presented is whether the District Court acted *prematurely and hence erroneously* in *dismissing the complaints on the stated ground,* thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim. When a federal court reviews the *sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions,* its task is necessarily a *limited* one. The issue is *not* whether a plaintiff will *ultimately prevail* but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear [in the subjective view of the judge, biased or not] on the face of the pleadings that a recovery is *very remote and unlikely* but *that is not the test*.

— *Scheuer v. Rhodes* 236

Conjecture #4: Perhaps the courts thought "these facts don't seem like such a big deal to me".

Refutation #4: Facts are for the jury, not the judge. Judges cannot act upon their personal feelings, especially given the *fundamental* nature of some of plaintiff's fifteen claims:

- In determining which rights are fundamental, *judges* are not left at large to decide cases in light of their *personal and private notions.* Rather, they must look to the traditions and [collective] conscience of our people to deter-

mine whether a principle is so rooted [there] ... as to be ranked as fundamental.

— *Griswold v. Connecticut* 493

Conjecture #5: Perhaps the courts thought "we're busy and this is a difficult case, so we're just going to ignore it, the *pro se* won't know what hit him (or will at least 'get the message' that we're never going to listen to him), and the case will just go away". (See Posner, Chap. 3-6.)

Refutation #5: America is a "nation of laws, not of men":

- *These rules* [not judges' individual whims, and not courts' individual "local rules", see p. 37 n. 10 *infra*] govern the procedure in the United States district courts in *all suits* of a civil nature ... They shall be construed and administered to secure the *just*, speedy, and inexpensive determination of every action.

— Fed.R.Civ.P. 1

Conjecture #6: Perhaps the courts honestly believed that a "threshold" standard was permissible, providing a justifying reason for dismissal of all of plaintiff's counts (see Question II, p. 15 n. 5 *supra*).

Refutation #6: The First Circuit courts have of course always consciously known that a "threshold" standard is illegitimate:

- The district court weighed this evidence against countervailing evidence by the employer, discounted it and found it wanting. In so doing, it violated *two* summary judgment [hence *a fortiori* motion-to-dismiss] precepts: it did not look at the evidence in the *light most favorable to the plaintiff*, and it *weighed the evidence and determined the truth of the matter*. *This it could not do.*

— *Olivera v. Nestle Puerto Rico, Inc.* 49

The district court invented the "threshold" standard out of whole cloth, thereby flatly disobeying previous First Circuit precedent. And the appeals courts, both panel and *en banc*,

silently sanctioned that disobedience. Those were all errors, because within a circuit only an *en banc* court can overrule a prior panel or *en banc* decision. Tigar 558–559. Those errors were compounded by the even more blatant disobediences (by district, panel, *en banc*), that within the federal system as a whole only the Supreme Court can overrule itself:

- [T]he lower courts are *bound* by [even] summary decisions by this Court until such time as the Court informs them [by *published* decision] that they are not.

—*Hicks v. Miranda* 344–345

The six conjectures *supra*, as well as all additional conjectures that plaintiff has been able to formulate, founder on the shoals of established rules, statutes, and cases. Dismissal thus appears contraindicated on *all possible* principles of *stare decisis*. It is therefore no exaggeration to say that the First Circuit courts' affirmatively silent disregard in this case for *stare decisis* (procedural and substantive, of statute, rule and law) constitutes square and irreconcilable abridgement of plaintiff's fundamental constitutional right to *due process*. U.S. Const. Amend. 5, 14 §1. See App. K, p. 55 *infra*.

CONCLUSION

For all the reasons argued herein, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

WE Tuvell

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APPENDIX

(Including *All* "Reasons" Stated Below On This Case) [7]

A (p. 28).

Paraphrase of Microsoft internal meeting of April 14, 1997. Referenced at pp. 3, 4 (twice), 5.

B (p. 30).

District court order dismissing fourteen counts, and denial to file amended complaint. November 3, 1999. Referenced at p. 5.

C (p. 31).

District court order clarifying its previous (App. B) order. December 10, 1999. Referenced at p. 5.

D (p. 32).

District court ruling on fraud count only (transcript of hearing, relevant portion complete). From the record below (Record Appendix below, Tab W, pp. 15-18). March 1, 2000. Referenced at pp. 1, 5, 15, 17.

E (p. 35).

District court final order of dismissal. March 2, 2000. Referenced at p. 6.

F (p. 36).

Circuit court opinion. December 15, 2000. Referenced at pp. 1, 6; footnote referenced at pp. 20, 21, 24.

G (p. 38).

Circuit court final judgment. December 15, 2000. Referenced at p. 6.

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[7] The materials included in this appendix have been typeset anew (in 11-point Book Antiqua font) pursuant to Sup.Ct.R. 33(1)(b). Some trivial typographic adjustments have been made in the process, for the sake of uniform appearance.

H (p. 39).

Circuit court order denying rehearing. March 13, 2001. Referenced at p. 6.

I (p. 41).

Microsoft self-admissions of discriminatory disability policy and practice in taking adverse employment action against Mr. Tuvell. From the record below. Referenced at pp. 11, 14 n. 4, 32 n. 9.

J (p. 43).

Table summarizing legal arguments. From Reply of Appellant/Plaintiff to main Brief of Appellee/Defendant on appeal, pp. 28–33. Referenced at pp. 4, 5.

K (p. 55).

Due process and *stare decisis*. Referenced at pp. 8, 21, 25.

App. A.
Paraphrase of Microsoft internal meeting of April 14, 1997. [8]

OK, let's summarize: Tuvell *himself* passed with flying colors. But he's married[iii] to a woman who cried[vi] at our wonderful party,[ix] which proves she's emotionally unstable,[ii] so she probably can't cope[i] with a cross-country relocation.[vii] Dragging her parents[i] along is just going to make her problems worse. Since Tuvell obviously loves his wife/family[vi] very much, those pressures would be too much for him at his age[iv] and he'd crack,[i] so we wouldn't get much productivity out of him. Too risky for us – let's just can[x] him. Good thing we pulled the "lawyers-flagged-the-contract" trick[ix] on him when we saw his résumé[iv] and "interviewed"[vi] his wife by phone. We can style it a "withdrawal"[ix] because he won't have time to resign[xiii] his old job (and even if he does who cares? – we hate OSF anyway). We'll even save the $25K signing bonus[xi] to boot. Of course if he does get rid of his wife/family[v] *then* we'd love to have him, so let's not alienate him. I know how we can spin it: we'll "sympathize" with him and tell him it's *not his fault*, but that his wife/family[vi] can't handle the relocation[xii] so the rejection is for *their own good*. That way he won't take it too hard,[viii],[xiv] and he'll even think we're really good, caring people. If he doesn't trust our superior judgment and tries to come here any, that will prove he has "bad business judgment".[xii] We'll[xv] get away with it like we always do, and then we'll go hunting for somebody else.

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[8] This paraphrase was presented in the record below, to both the district and circuit courts. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("MemoInOpp", Tab M) p. 34 ¶50; Brief of Appellant/Plaintiff p. 7 ¶21. [Though no proof is necessary at this motion-to-dismiss stage, note that Microsoft readily admits this meeting did occur, among the three named Microsoft principals in this case (p. 3 *supra*), on the date claimed, at Microsoft's offices in Redmond, Washington. Affidavit of David Thompson to MCAD, November 10, 1997.]

Legend

Superscripts in the paraphrase *supra* indicate the several elements of plaintiff's complaint, *viz*:

i. Discrimination on the basis of disability.
ii. Discrimination on the basis of sex.
iii. Discrimination on the basis of marital status.
iv. Discrimination on the basis of age.
v. Right of association.
vi. Invasion of privacy.
vii. Right to travel/migrate.
viii. Intentional infliction of emotional distress.
ix. Fraud/misrepresentation.
x. Breach of contract.
xi. Breach of covenant of good faith and fair dealing.
xii. Defamation/slander.
xiii. Tortious interference with advantageous relationship.
xiv. Negligent infliction of emotional distress.
xv. Negligent management, hiring and/or retention.

Comments

It is to be noted that these fifteen counts are largely *independent* of one another. Hence dismissal of any count, justified or not, cannot "automatically" (i.e., silently) redound to the prejudice of other counts.

It is to be further noted that five of these counts (i-iv, vii) *first appeared* in the instant case, and were never mentioned in the *previous* case (which was dismissed without prejudice, p. 4 *supra*). Hence the *reasons* stated for the *previous* dismissal of the original ten counts cannot even conceivably redound to the prejudice of the five new counts. Finally, the *previous* reasons cannot *now* redound to the prejudice of the ten original counts either, because the previous case was dismissed (due to "ineffective counsel") *without prejudice* to the instant case, and all the *previous* reasons are comprehensively rebutted in the new pleadings of the instant case.

App. B.
District court order dismissing fourteen counts, and denial to file amended complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11082-NG

WALTER TUVELL, *PLAINTIFF*
v.
MICROSOFT CORPORATION, *DEFENDANT*

GERTNER, D.J.

ORDER

Defendant filed a motion to dismiss [docket entry #5] all claims. I grant defendant's motion with respect to all claims except Count III (fraud/misrepresentation). I also order plaintiff to file an amended complaint in compliance with both Rule 8 and Rule 9(b) of the Federal Rules of Civil Procedure by November 18, 1999. These rules require that the complaint be a short and plain statement of the claim, showing that the plaintiff is entitled to relief, and that the allegations regarding the circumstances constituting fraud be stated with particularity.

So ordered.

Dated: November 3, 1999.

/s/ *Nancy Gertner*
Nancy Gertner, U.S.D.J.

App. C.
District court order clarifying its previous (App. B) order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11082-NG

WALTER TUVELL, *PLAINTIFF*

V.

MICROSOFT CORPORATION, *DEFENDANT*

GERTNER, D.J.

ORDER

Defendant filed a motion to dismiss [docket entry #8 *[sic (should be "#5")]*] all claims. I granted defendant's motion with respect to all claims except Count III (fraud/misrepresentation). I also ordered plaintiff to file an amended complaint in compliance with both Rule 8 and Rule 9(b) of the Federal Rules of Civil Procedure by November 18, 1999. Plaintiff filed two amended complaints, one that contained only the Fraud/Misrepresentation claim [docket entry 18] and one containing all of his original claims [docket entry 19]. I hereby dismiss the amended complaint containing all of the original claims [docket entry 19] and order defendant to respond to the amended complaint containing only the claim for fraud/misrepresentation [docket entry 18].

So ordered.

Dated: December 10, 1999.

/s/ *Nancy Gertner*
Nancy Gertner, U.S.D.J.

App. D.
District court ruling on fraud count only (transcript of hearing, relevant portion complete). [9]

I ordinarily don't make a ruling, then, from the bench, but I think I can in this case, both a combination of what I have done before as well as today.

That the Tuvells were – that Mr. Tuvell, in particular, was put out by Microsoft's behavior, that you felt misled, may all be true. But the question is whether or not the allegations in the complaint meet the threshhold *[sic]* standard here. And I agree with Microsoft that this does not.

You may believe that the facts underlying all the things that Microsoft did are as you've described, but that's not enough to go on in this court. Generalized perception and generalized belief of the – that the facts are one way is not enough. There's a certain point at which you really have to at least make an allegation as to what the basis of that is. And I think you've failed to do that.

To survive dismissal, you have to set forth direct, factual allegations regarding each material element, not an unsupportable conclusion.

You're *[sic]* false statements of belief – your statements of belief can't be enough. You have to identify the source of factual information. And I don't believe that you did so here.

The statements – rather than going through them point by point, the statements – I'll just sort of describe the statements, each of which I believe to be insufficient on their face.

There's the 2/13 call from Mr. *[sic (should be "Ms.")]* Johnson saying that Microsoft was trying to be more family-friendly.

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[9] Note that the district judge here made numerous statements that can only be characterized as "counterfactual". See App. I, p. 41 *infra*.

And also that there was no interest in interfering with Mr. Tuvell or with his relationship with his wife. These are vague comments. Nothing about it is false. Again, one may be annoyed as a human being, but the question is whether it's actionable.

The statement that Mr. Tuvell had a great interview and that Microsoft was preparing an offer is not actionable.

That Mr. *[sic]* Johnson will give an offer that week, that is to say, the week of – the statement made on April 7th, the statement made on April 9th by Ms. MacGougan is also not actionable. The statements made on 4/11 are also not actionable.

The promises supposedly about recruitment programs, assistance policies, etc., are not alleged with particularity.

The 3/26 – the dinner party, rather – the dinner party on 4/11 is really the core of Mr. Tuvell's complaint, and it seems to me that that is particularly thin as a basis to hang this lawsuit.

I suppose there are two interpretations one could have. One could be that the dinner was intended to do one more look-see at the candidate, and something happened at that dinner party which made Microsoft reconsider its offer.

I suppose it's conceivable that it was a ruse to psychological test, but even if one admits that that's conceivable, that's not enough under the facts of this case. That's simply not enough. If there's an A alternative and a B alternative, and either is conceivable, then you haven't made your – you haven't met your standard.

I might add, it's more than just either is conceivable. There's simply no basis to believe anything other than your generalized perception that something amiss was going on. There's really no basis that that was so.

Mr. Thompson's handshake and statement, "Glad to have you coming on board," on 4/11, again there's no basis for believing that this statement was false when it was made.

The 4/15 statement by Ms. MacGougan, the 4/18 statement of Ms. MacGougan and the various statements of Ms. MacGougan with respect to coming to Seattle to accept the offer and attending a postacceptance *[sic]* dinner party, etc., all of these are not clear that anything was false when made and not sufficiently specific.

The 4/11 statement that you could accept the *[sic]* orally, that you didn't need to sign it, I actually addressed when I dealt with the contract claim under these circumstances. That's not actionable.

The we'll mail a copy of the offer, written contract, next week also is not actionable.

Looking at this carefully, Mr. Tuvell, you may feel wronged, but feeling wronged in life in general is not the same thing as creating a pleading that is actionable in a court of law. And so, I'm going to grant Microsoft's motion under 12(b)(6) and 9(b) to dismiss the latest amended complaint and demand for a jury trial.

Thank you all very much.

App. E.
District court final order of dismissal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11082-NG

WALTER TUVELL, *PLAINTIFF*

V.

MICROSOFT CORPORATION, *DEFENDANT*

GERTNER, D.J.

ORDER OF DISMISSAL

In accordance with the court's allowance of the defendant's motion to dismiss on 3/1/00, it is hereby ordered that the above-entitled action be and hereby is dismissed.

Date 3/2/00.

By the Court,

/s/ Jennifer Mulcahy
Deputy Clerk

App. F.
Circuit court opinion.

[NOT FOR PUBLICATION — NOT TO BE CITED AS PRECEDENT]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1444

WALTER TUVELL, *PLAINTIFF, APPELLANT*

v.

MICROSOFT CORPORATION, *DEFENDANT, APPELLEE*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. NANCY GERTNER, *U.S. DISTRICT JUDGE*]

BEFORE
TORRUELLA, *CHIEF JUDGE*,
BOUDIN AND LIPEZ, *CIRCUIT JUDGES*

WALTER TUVELL, ON BRIEF *PRO SE*

ALAN D. ROSE, MICHAEL L. CHINITZ, RICHARD E. BOWMAN AND ROSE & ASSOCIATES ON BRIEF FOR APPELLEE

DECEMBER 15, 2000

Per Curiam. After carefully considering the briefs and record on appeal, we affirm the decision of the lower court.

The appellee argues that because the appellant's notice of appeal designated only the last order entered dismissing the fraud count, our review is limited to the dismissal of that count. We disagree. The appellant clearly indicated his intention to appeal from the dismissal of all claims. *Johns's Insulation, Inc. v. L. Addison and Associates, Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (notice designating final judgment encompasses interlocutory orders merging in the judgment);

Kotler v. American Tobacco Company, et al., 981 F.2d 7, 11 (1st Cir. 1992) (functional approach).

However, having reviewed the briefs, the record and the reasons given in the district court for its disposition, we are satisfied that no error was committed and that the appellant's claims were properly dismissed.

Affirmed. Loc.R. 27(c).[10]

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[10] Loc.R. 27(c) of the First Circuit provides:

- Summary Disposition. At any time, on such notice as the court may order, on motion of appellee or *sua sponte*, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

This kind of local rule is "*plainly wrong* [because it] spawn[s] a body of *secret law*" according to J. Stevens (p. 20 *supra*), and which is now "[ripe] for *central review* ... in the interest of establishing a *sensible, even-handed system for all of the circuits*" according to J. Ginsburg (p. 21 *supra*).

App. G.
Circuit court final judgment.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 00-1444

WALTER TUVELL, *PLAINTIFF, APPELLANT*

V.

MICROSOFT CORPORATION, *DEFENDANT, APPELLEE*

JUDGMENT

ENTERED: DECEMBER 15, 2000

This cause came to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court,

/s/ Phoebe Morse
Clerk

[cc: Messrs. Tuvell, Rose]

App. H.
Circuit court order denying rehearing.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1444

WALTER TUVELL, *PLAINTIFF, APPELLANT*

v.

MICROSOFT CORPORATION, *DEFENDANT, APPELLEE*

BEFORE

TORRUELLA, *CHIEF JUDGE,*
SELYA, BOUDIN, AND LIPIZ, *CIRCUIT JUDGES*

ORDER OF COURT

ENTERED: MARCH 13, 2001

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing having been submitted the active judges of this court and a majority of the judges not having voted that the case be heard *en banc*, it is ordered that the petition for rehearing and petition for rehearing *en banc* be denied.

By the Court,

/s/ *Phoebe D. Morse*
Clerk

By:

/s/ *Janice M. O'Neil*
Chief Deputy Clerk

cc: Messrs. Tuvell, Rose

* Judge Stahl and Judge Lynch are recused and did not participate in the consideration of this matter.

App. I.
Microsoft self-admissions of discriminatory disability policy and practice in taking adverse employment action against Mr. Tuvell.

- Microsoft withdrew[11] its employment offer because of its legitimate concern that Mr. Tuvell[12] and his family had expressed extreme reluctance to relocate to Seattle. ... Tuvell's wife asked no questions about the Seattle area and generally appeared to lack any interest in relocating to Seattle. On April 15, 1997, in light of these events, Meg MacGougan ("MacGougen"), Microsoft's recruiter, informed Tuvell that Microsoft was temporarily withdrawing its offer of employment. MacGougen conveyed that Microsoft had legitimate concerns that Tuvell and his family were reluctant to leave Massachusetts and move to Washington. ... MacGougan took this step, as she had on other occasions, to determine if Tuvell and his wife would set aside or otherwise resolve their concerns about relocation. ... There is ample evidence to justify Microsoft's proffered reason ... This was a real issue ... and held significant consequences for Microsoft, if Tuvell had accepted the offer, begun work, and then

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[11] Microsoft here falsely characterizes the adverse job action. In truth, plaintiff had already accepted the offer, and Microsoft's action was a *termination*. But that dispute *need not be reached* by this Court, because the ADA prohibits adverse employment actions of *any* kind. ADA §12112(a).

[12] Microsoft's allusions to *plaintiff's* reluctance to relocate are provably false and fabricated, as Microsoft acknowledged in later pleadings by dropping them. Plaintiff (who formerly lived in Seattle) was always visibly enthusiastic to relocate back to his previous hometown, as Microsoft well knew. In truth, Microsoft was always and only (secretly) concerned about plaintiff's *wife's* psychological capability to relocate/migrate. But this factual dispute *need not be reached* by this Court. For, Microsoft's adverse employment actions against plaintiff *still* violate ADA §12102(2)(A) *even if* plaintiff himself had exhibited some anxiety about relocation (which is, in any case, a universally common and expected human reaction to relocation).

changed his mind due to the difficulties of cross-country relocation.

– Microsoft position statement to MACD,
November 11, 1997
(Record Appendix below, Tab M, App. H, pp. 2–4, 8)

- Respondent stated that Complainant's wife expressed her concerns about moving, and Respondent withdrew its offer per its policy.

– MCAD summary of findings,
January 23, 1998
(Record Appendix below, Tab L, App. E, p. 2)

- Microsoft revoked its offer because of its legitimate concerns about Tuvell's and his family's reluctance to relocate. ... [Discrimination law] does not require an employer to hire an employee, like Tuvell, who is reluctant to relocate from the East Coast to the West Coast and thus might quit his job soon after the employer has borne the considerable expense of recruiting, hiring, moving, and training that employee. Simply stated, Microsoft had legitimate reasons for revoking its offer once it became clear that Tuvell and his family were not prepared to move to Washington.

– Microsoft letter to MCAD,
May 21, 1999
(Record Appendix below, Tab M, App. P, pp. 2–3)

- ... Tuvell's wife was not genuinely prepared to move to Seattle, as Microsoft perceived; ...

– Microsoft motion to dismiss instant case,
July 12, 1999
(Record Appendix below, Tab L, p. 4)

App. I.
Table summarizing legal arguments.

The table included in this appendix briefly summarizes the legal arguments presented in the main briefs of the parties on appeal. This table itself appeared in the Reply of Appellant/Plaintiff on appeal, at pp. 28–33. (The *locations* in the record below of the arguments mentioned in the table can be found by consulting the companion Table of Concordances, *Id.*, pp. 46–47.)

As summarized by the table, plaintiff's legal arguments below overwhelmingly rebut *all* of Microsoft's arguments, while Microsoft *attempted* rebutting *none* of plaintiff's arguments. Rather, as the table hints, Microsoft only attempted rebutting its outrageously *distorted* versions of plaintiff's factual averments. The courts below were *bound* to *ignore* those distorted factual claims, by the precepts of the "notice-pleading" standard at motion-to-dismiss stage, but they refused to do so (Question II).

Of course, the *substantive* dispute over "whose version of the facts is correct" *need not be reached* for the purposes of this petition. For, fact-finding disputes can only be resolved by juries, not by courts (not even by this Court). All that need be reached for the *procedural* purposes of this petition is that the arguments below, as summarized by this table, *prove*[13] there exist *no "apparent justifying reasons" for dismissal* of any count (Question I).

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[13] This proof is incontrovertible. For as the table shows, plaintiff's arguments below plainly cast *at least "some doubt"* on the legal efficacy of Microsoft's arguments in favor of dismissal. But 12(b)(6) dismissal is appropriate *only* if the strongest possible standard of proof is met, namely the *"beyond doubt"* standard. *Conley v. Gibson*, p. 12 *supra*. Hence, 12(b)(6) dismissal is provably inappropriate in this case.

Breach of Contract	
Argument for Dismissal	*Argument against Dismissal*
Claim precluded by at-will employment rule	Employment was "just-cause" (not "at-will" or "term-of-years") — such was represented to Mr. Tuvell individually, and is standard in the industry and especially so at Microsoft for employees similarly situated as Mr. Tuvell ("common law of the shop": course of dealing, course of performance, usage of trade)
	Microsoft *never intended* at-will contract — for by Microsoft self-admission, it fired Mr. Tuvell because it speculated he "might quit before Microsoft wanted him to"
Claim of contract for term of years precluded by Statute of Frauds	Statute of Frauds inapplicable because written contract signed by Microsoft did exist; also, Microsoft was fraudulent in its contract-making (equitable estoppel from asserting Statute of Frauds)
	Cannot "blame Ms. King" (she was not party to, nor term of, contract)
	Additional valuable consideration (resigned former job)

Good Faith and Fair Dealing	
Argument for Dismissal	*Argument against Dismissal*
No such cause of action under Washington law	Massachusetts law applies: justified expectation of basic policies underlying employment (master/servant) law
No Fortune claim under Massachusetts law because Tuvell never performed any employment services	Service was performed for the "signing bonus" (oral acceptance was performed per mutual agreement, written acceptance having been waived by Microsoft)
No allegation that Microsoft's alleged conduct violated a clearly established public policy	None required
	If contract had genuinely been "at-will", then subsequent reinterpretation of at-will term to permit termination by Microsoft for "speculation that Mr. Tuvell might quit before Microsoft wanted him to" was also breach of good faith and fair dealing

Fraud/Misrepresentation	
Argument for Dismissal	*Argument against Dismissal*
Alleged misrepresentations are promissory in nature	Many misrepresentations of existing material fact susceptible of actual knowledge (also non-disclosure and concealment) were made which were known false at the time, and unconditional promises were made with no present intention of keeping them – all with the intention that plaintiff should rely on them
No detrimental or reasonable reliance	Much reasonable reliance, with detrimental consequences (including pecuniary loss of job and relocation; detriment arising from other known-harm from other Counts in this lawsuit; detriment from known-necessity to prosecute this lawsuit)
	Collective and individual scienter alleged: Microsoft *admits policy and practice* of firing employees whose spouses it doesn't like, exactly as occurred in this case
	Cannot "blame Ms. King" (she was innocent bystander, not an actor)

Intentional Infliction of Emotional Distress	
Argument for Dismissal	*Argument against Dismissal*
Alleged conduct is not extreme and outrageous	Conduct was utterly extreme and outrageous: "set up" and lied about sham party; held job "hostage" to coerce attendance by Ms. King; fired Mr. Tuvell because wife/family wasn't "good enough"; refusal to rehire while associated with wife/family; "you chose the wrong marriage partner 10 years ago"
Negligent Infliction of Emotional Distress	
Argument for Dismissal	*Argument against Dismissal*
Claim cannot rest on an employer's termination of an at-will employment relationship	Employment was just-cause, not at-will or term-of-years – but that's not the basis of this claim in any case
	Fired Mr. Tuvell without determining whether he had resigned from former employer, leaving him in worse position than before recruiting process began (this may rise to *intentional* infliction of emotional distress)

Tortious Interference with Advantageous Relationship	
Argument for Dismissal	*Argument against Dismissal*
No contact between Microsoft and Tuvell's employer, The Open Group	Microsoft did contact Open Group, by self-admission (Complaint ¶¶45-46)
No allegation of improper means or motive	Termination for illegal and/or known-false reasons is improper means ("bad business judgment" was known-false)
Tuvell continued at The Open Group	Any detriment (such as demotion, not necessarily termination) sufficient to support charge

Invasion of Privacy	
Argument for Dismissal	*Argument against Dismissal*
No specific allegation of an invasion of privacy, or serious or substantial invasion	Specific allegations of unreasonable, substantial, serious invasion of privacy (MPA): surreptitious investigation (by phone and at coerced-attendance sham party); explicit determination that wife was unhappy and psychologically unfit to relocate, by Microsoft self-admission
Claim undermined by Tuvell's voluntary disclosure to Microsoft of numerous private facts	Disclosure of trivial personal facts and normal stresses attendant upon relocation do not invite invasion of marital privacy; Mr. Tuvell misled about nature of invasion by Microsoft's fraud (thinking it was innocent, however misguided); this is a jury question
	Threats, intimidation, coercion (MCRA)

Defamation/Slander	
Argument for Dismissal	*Argument against Dismissal*
Alleged defamatory statement is not actionable because it is an opinion	Slurs of psychological incapacity and unhappiness about relocating, and of "bad business judgment", are defamatory and actionable
Internal discussions are privileged	Known-false defeats conditional privilege
No allegation of publication to a third party	Internal publication of known-false material (Microsoft self-admission); compelled self-publication to third parties
	Microsoft's stated reasons for "bad business judgment" charge are nakedly perjurious, implying known-false at the time
Negligent Management, Hiring, Retention	
Argument for Dismissal	*Argument against Dismissal*
No cause of action under Massachusetts law for negligent recruitment and hiring	Microsoft knowingly distorts the meaning of plaintiff's pleading — Massachusetts does support a cause of action as plaintiff has pled it
Claim is precluded by the economic loss rule	Unclear what Microsoft's argument is

Disability Discrimination (ADA)	
Argument for Dismissal	*Argument against Dismissal*
Did not include such claim with MCAD charge	Claim properly presented to MCAD in amendment letter
Claim is time-barred (filed more than 90 days after notice of right to sue)	Timely filed within 90-day right-to-sue deadline (administratively erroneous premature right-to-sue letter was invalid when drafted and rescinded; ineffective counsel; misrepresentation by Microsoft)
No allegation of recognized disability or limitation of major life activity	Mental and physical "regarded-as" relational/associational disabilities correctly alleged; perceived inability to relocate is limitation of major life activity; this is a jury question
Alleged impairment of major life activity – "fear of moving" – is legally insufficient	Psychological capacity to migrate is entirely sufficient impairment of major life activity (and is a jury question, not a legal question)
	Mixed motive

Age Discrimination (ADEA)	
Argument for Dismissal	*Argument against Dismissal*
Time-barred (see *supra*)	Timely filed (see *supra*)
Claim based on conclusory allegations	Conclusory allegations would be enough at motion-to-dismiss stage, but sufficient inference of facts and discriminatory animus are alleged; Microsoft's animus to older workers is publicly known
ADEA claims based on disparate impact are not actionable	Claim is based on disparate treatment, not disparate impact
	Mixed motive
Sex & Marital Status Discrimination (Title VII)	
Argument for Dismissal	*Argument against Dismissal*
Time-barred (see *supra*)	Timely filed (see *supra*)
Marital status is not protected category	Sexual discrimination via marriage-proxy is protected
	Mixed motive

Discrimination (MFEPA)	
Argument for Dismissal	*Argument against Dismissal*
Chapter 151B does not apply to conduct outside of Massachusetts	Microsoft reached into Massachusetts, and Massachusetts law applies: justified expectation of basic policies underlying employment (master/servant) law
See *supra* pleading cognate federal discrimination claims	See *supra* for refutations
Right of Association	
Argument for Dismissal	*Argument against Dismissal*
No allegation of actionable threats, intimidation or coercion	Entirely proper allegations of actionable threats, intimidation and coercion (MCRA); this is a jury question

Right to Travel	
Argument for Dismissal	*Argument against Dismissal*
No allegation of interference with ability to travel to Washington	Allegation of interference with migration (not mere border-crossing) to Washington
No allegation of 42 U.S.C. §1985 claim	None required
No conspiracy exists between corporation and corporate officials acting in corporate capacity	None required
No allegations of racial or other class-based motive	None required
Claim cannot rely on conclusory allegations	Conclusory allegations would be enough at motion-to-dismiss stage, but more than sufficient facts are alleged anyway (including Microsoft self-admission)
No allegation Tuvell is a member of a protected class	None required
No allegation that interference with right to travel is the conscious objective of the alleged conspiracy	Explicit allegation that interference was specifically/consciously motivated by considerations of right to travel/migrate (self-admitted by Microsoft)
	Threats, intimidation, coercion (MCRA)

App. K.
Due process and *stare decisis.* [14]

This App. K consists entirely of direct quotations concerning due process and *stare decisis* (broadly interpreted, i.e., statute, rule and law), and the tight bond between them. See also generally *Pacific Mutual Life Ins. Co. v. Haslip* 28–40, Scalia, J.

The Court is invited to reach the proposition that the lower courts' affirmatively *silent (unexplained)* refusal to observe *stare decisis* (i.e., to "play by the rules") amounts to *denial of due process* – and not "merely" to judicial error or abuse of discretion. An observation such as this would ordinarily be considered an axiomatic tautology not in need of proof – *but for* the highly extraordinary nature of this case (Questions I–III), which makes it relevant here.

- The history of liberty has largely been the history of the observance of procedural safeguards [i.e., *procedural due process*].

  – *McNabb v. United States* 347, Frankfurter, J.

- It is now the *settled doctrine* of this Court that the *Due Process* Clause embodies a system of rights based on *moral principles* so deeply imbedded in the traditions and feelings of our people as to be deemed *fundamental to a civilized society* as conceived by our whole history. Due Process is that which comports with the *deepest notions* of what is *fair and right and just*. *The more fundamental the beliefs are[,] the less likely they are to be explicitly stated [such as respect for the doctrine of stare decisis]*. But respect for them is of the *very essence* of the Due Process Clause.

  – *Solesbee v. Balkcom* 16, Frankfurter, J.

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[14] Like the Addendum at p. 21 *supra*, this App. K is "relevant but optional", in the sense that it invites the Court to reach a proposition slightly beyond the minimum strictly necessary to be decided in this case.

- [C]onsistently with the requirements of *due process*, no change in *ancient procedure* can be made which disregards those *fundamental principles*, to be ascertained from time to time by *judicial action* [emphasizing the *special* importance of courts and judges], which have relation to *process of law*, and protect the citizen in his private right, and guard him against the *arbitrary action of government*. This idea has been many times expressed in differing words by this court ... The words "due process of law" were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the *established principles* of private rights and distributive justice. ... This court has never attempted to define with precision the words "due process of law". ... It is sufficient to say that there are certain *immutable principles of justice [such as stare decisis]* which inhere in the very idea of free government ...

  — *Twining v. State of New Jersey* 101–102

- The Court has said *often* and with *great emphasis* that the doctrine of *stare decisis* is of *fundamental importance to the rule of law* [i.e., *"law of the land"*, also known as *due process, Pacific Mutual Life Ins. Co. v. Haslip* 29]. ... Although we have cautioned that *stare decisis* is a principle of *policy* and not a mechanical formula of adherence to the latest decision ..., it is *indisputable* that *stare decisis* is a basic self-governing principle within the *Judicial Branch*, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an *arbitrary discretion*. ... *[S]tare decisis* ensures that the law will not merely change *erratically* and permits society to presume that *bedrock principles* are founded in the law rather than in the proclivities of individuals [*"nation of laws, not of men"*].

  — *Patterson v. McLean Credit Union* 172

- The rule of *stare decisis* is *essential* if case-by-case judicial decisionmaking is to be reconciled with the principle of

the *rule of law* [i.e., *due process*, see previous item], for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of *judicial will*, with *arbitrary and unpredictable results*.

— *Thornburgh v. American College of Obstetricians and Gynecologists* 786–787

- *The* fundamental requisite of *due process of law* is the opportunity to be *heard*. ... The opportunity to be heard must be *tailored* to the *capacities and circumstances* of those who are to be heard. ... In almost every setting where important decisions turn on questions of fact, *due process requires* an opportunity to confront and cross-examine adverse witnesses. ... This Court has been *zealous* to protect these rights from *erosion*. ... Finally, the decision-maker's conclusion ... *must* rest *solely* on the *legal rules and evidence* adduced at the hearing. ... To demonstrate compliance with this *elementary requirement*, the decision maker should *state the reasons* for his determination, and indicate the evidence relied upon ... And, of course, an *impartial* decision maker is essential.

— *Goldberg v. Kelly* 268–271

- The hearing, moreover, must be a *real* one, not a *sham* or a *pretense*.

— *Palko v. Connecticut* 327, Cardozo, J.

- A *fair* trial in a *fair* tribunal is a *basic* requirement of *due process*.

— *In re Murchison* 136

- The important point is that *judicial legitimacy* cannot be attained solely through an unyielding focus on particular substantive results. Instead, the legitimacy of the judicial process is and will remain a function of the *perceived fairness of the rules of the game* [i.e., *"procedural due process"*]. ... One should also note that judicial legitimacy is an essential of *any system of law* in a pluralistic society. No substantive *rule of law* is meaningful if the *means of enforc-*

ing the rule do not exist or, *worse yet,* are *hopelessly unreliable* or corrupt. ... Imagine a football game in which the referee awarded possession of the ball on a whim, added or subtracted yardage as he thought appropriate, or scored touchdowns and fieldgoals on a sliding scale. The *viability of the game* requires reasonably determinate rules and *cabined discretion* on the part of the officials; a requirement that officials *give reasons* in support of their calls is *essential* to cabining the discretion of the judges. ... In the public courts ... the *duty of reasoned explanation* [i.e., *stare decisis*] is *essential* to maintaining the *integrity of the process.* A judge has as much *obligation* to explain to the community why the prevailing party has achieved that status as she does to explain to the losing party why the decision is adverse. ... Common to almost all variations of the concept of the Rule of Law is a *commitment to limiting official discretion in meaningful ways* and ensuring that *adequate process* accompanies the application of *previously known rules.* ... *"Equal justice under law"* must be something more than a mere catch-phrase or solely a description of ADR [alternative dispute resolution].

– Krotoszynski 998, 1020–1021, 1025, 1052

- When we study law we are not studying a *mystery* but a well-known *profession.* ... The object of our study, then, is *prediction,* the prediction of the incidence of the public force through the instrumentality of the courts. ... It is to make the *prophecies* easier to be remembered and to be understood that the *teachings of the decisions of the past* [i.e., *stare decisis*] are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. ... Take the fundamental question, *What constitutes the law? ... The prophecies [based on due process and stare decisis] of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*

– Holmes 457, 458, 460–461